Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
OPEN VIDEO SYSTEMS	)	

OPPOSITION OF RESIDENTIAL COMMUNICATIONS NETWORK, INC. TO PETITIONS FOR RECONSIDERATION

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SUMMARY

The Commission's Second Report and Order carefully weighed the complex issues surrounding the open video systems structure set forth by Congress and reached an appropriate balance of the various positions and interests set forth in the comments filed by numerous interests. The various petitions for reconsideration of the order adopting those regulations offer no reason to change those regulations. RCN therefore urges that the Commission reject such petitions. In particular, RCN submits that the Commission should reject arguments asking it to pull back on the important pro-competitive steps it took with regard to program access rules and that it not yield to requests that it apply burdensome and unnecessary regulation on OVS systems.

- **Program Access** is critical to the viability of open video systems and therefore to the development of meaningful competition in the video distribution marketplace. Contrary to the contentions of some of the petitioners, the Commission acted well within its authority in applying the program access rules to all OVS programming providers. Section 628 of the Communications Act requires the Commission to adopt any regulations necessary to protect multichannel video programming providers ("MVPD") from anti-competitive behavior by cable operators or satellite programmers that are affiliated with cable operators. Because OVS programming providers that provide more than one channel of programming clearly fit the definition of MVPD contained in both the statutes and the Commission's regulations, they are protected by the provision. By requiring vertically integrated satellite programmers to provide non-discriminatory access to their programming to all OVS programming providers, the

Commission is furthering the goal of Congress in creating the OVS option -- to encourage robust competition in the delivery of video services.

- **Regulation.** The Commission's order struck an appropriate balance between the interests of encouraging competition to develop and the need for government oversight of such development. It also correctly recognized, as had Congress, that OVS systems will compete head to head with entrenched cable monopolies and that, therefore, competition, not regulation, is the most appropriate assurance that the systems will be operated in the public interest. The Commission should therefore not impose any additional regulatory burdens on OVS systems.

Congress made it clear that OVS operators were to be subject to minimal regulations in order to encourage entry into the market. They were exempted from Title II regulations and instead are merely required to certify to the Commission their compliance with all applicable regulations. In addition, they were, with very few exceptions, exempted from the franchising requirements of title IV. Despite these clear statutory mandates, several petitioners urge the commission to subject OVS operators to stringent pre-certification requirements reminiscent of the requirements of Title II. Others seek to increase the control of franchise authorities over these operators by, among other things, allowing franchisers to require OVS operators to construct an institutional network. These regulations are contrary to Congressional intent to facilitate new entry into the video services market, and they are excessive in light of the strong competitive forces that will OVS operators will face from incumbent cable operators.

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I. Introduction

Residential Communications Network, Inc. ("RCN"), by its undersigned counsel, hereby submits its opposition to the petitions, filed by various parties, for reconsideration of the Commission's Second Report and Order[1] in the above captioned proceeding. RCN has a substantial interest in assuring that the rules implementing Open Video Systems ("OVS") developed by the Commission are not altered. The Commission's rules will serve the public interest by encouraging local telephone companies -- both incumbent and new entrants -- to develop OVS platforms to enable multi-channel video programming distributors ("MVPDs") like RCN to distribute competitive video programming to subscribers. RCN believes that the rules

[1] Second Report and Order, CS Docket No. 96-46, FCC 96-249 (rel. June 3, 1996) ("OVS Order").

adopted by the Commission will permit the marketplace to develop the kind of innovative competitive options sought by Congress, while at the same time assuring that the statutory obligations imposed in the 1996 Act are met by OVS operators. On the other hand, the suggested revisions of these rules proposed by parties seeking reconsideration are generally designed to facilitate anticompetitive behavior or excessive regulatory control. Specifically, RCN strongly urges the Commission to retain the rules it adopted in the OVS order regarding application of the "program access rules" to the OVS context and to refrain from granting local franchising authorities any additional power over OVS operators or OVS programming providers.

II. Program Access

As competing methods of multichannel video programming distribution have become realistic alternatives for consumers, cable operators that are affiliated with satellite programmers have taken steps to protect their competitive advantage by denying these competitors access to the programming of their affiliates. Congress squarely addressed this anti-competitive behavior in section 628 of the Cable Consumer Protection Act of 1992. Section 628, the "program access" provision, prohibits cable operators or satellite programmers that are affiliated with cable operators, from engaging in anticompetitive conduct that would significantly hinder the ability of competing MVPDs from providing satellite cable programming or satellite broadcast programming to consumers.[2] Specifically, Congress required such entities to refrain from entering into exclusive contracts with cable operators and to provide their programming to

[2] Communications Act § 628, 47 U.S.C. § 548.

competing MVPDs.[3] In the Telecommunications Act of 1996,[4] Congress extended and clarified these rules by stating that any provision of § 628 that applies to a cable operator shall apply to any operator of a certificated open video system.[5] In this way, Congress clearly foreclosed the types of anti-competitive efforts which were engaged in by certain cable companies and their affiliated programming companies in denying programming to video dialtone programmers such as RCN. In its OVS Order implementing these provisions, the Commission adopted rules to implement the 1996 Act's clarification of § 628.[6] At the same time, the Commission also correctly interpreted the § 628 to prohibit discrimination against OVS programming providers by the vertically integrated entities covered by the provision.

Now Rainbow Programming Holdings, Inc., a wholly owned subsidiary of Cablevision Systems Corporation ("Cablevision") and the National Cable Television Association ("NCTA") argue that the Commission's application of these rules to OVS programming providers was improper because (1) it exceeded the Commission's statutory authority; (2) it is inconsistent with the policy of the 1996 Act and will stifle competition and harm consumers; and (3) that the action is not "rationally related" to promoting the goals of open video systems. These arguments are merely an attempt by cable affiliated entities to maintain their dominant market position

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[3] *See* Development of Competition and Diversity in Video Programming Distribution and Carriage (MM Docket No. 92-265), 8 FCC Rcd 3359, 3412 (1993).

[4] Pub. L. No. 104-104, 100 Stat. 56, *approved* February 8, 1996 ("1996 Act").

[5] Communications Act of 1996 § 302, 47 U.S.C. § 573.

[6] OVS Order at ¶¶ 175-180.

despite the pro-competitive policy of the 1996 Act. They offer no valid reason for the Commission to alter its regulations adopted in the OVS Order.

A. The Commission Has Ample Statutory Authority to Apply the Program Access Rules to OVS

Both Rainbow and the NCTA argue that the Commission exceeded its statutory authority by applying the program access rules to OVS programming providers. Their arguments fail because they completely misrepresent the Commission's analysis of the issue. Both petitioners insist that the program access rules cannot be applied to OVS programmer or packagers because, in the 1996 Act, Congress expressly extended § 628 to OVS operators alone. However, the Commission's application of § 628 to OVS programing providers is based on the 1992 Act itself, it had no need to rely on the extension of that provision in the 1996 Act.

Section 628(b) provides:

> It shall be unlawful for a *cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor* to engage in unfair methods of competition or unfair or deceptive acts or practices, the purposes or effect of which is to hinder significantly or to prevent *any multichannel video programming distributor* from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[7]

Thus, § 628 protects all MVPDs by limiting the potentially anti-competitive behavior of vertically integrated cable operators. Similarly, vertically integrated OVS operators were also prohibited from engaging in potentially anticompetitive behavior as well. Contrary to the arguments advanced in the petitions, the Commission's ruling did not extend the scope of the

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[7] Communications Act of 1934 *as amended* §628(b), *codified at* 47 U.S.C. § 548(b) (emphasis added).

protected class of "any multichannel video programming distributor." Thus, the Commission's program access analysis holds that the "OVS Operator" reference in § 302 requires that vertically integrated OVS operators will be as restricted by § 628 as vertically integrated cable operators,[8] but otherwise its analysis simply recognizes that OVS programming providers are among the class of § 628's protected entities because they are MVPDs. As the legislative history confirms, § 302 in no way alters the definition of MVPD.[9]

Pursuant to § 628, conduct that would harm the ability of *any* MVPD to provide programming to subscribers is proscribed. Despite Rainbow's contentions to the contrary, discussed in greater detail in Section C *infra*, there can be no doubt that OVS programming providers are MVPDs.[10] Consequently, § 628, by its terms, prohibits anti-competitive conduct toward OVS programming providers.

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[8] See OVS Order ¶¶ 175-180.

[9] Congress' express extension of the program access protections to operators of open video systems does not indicate an intention to exclude other, unnamed multichannel video programming distributors from those protections. When Congress chose to apply Section 325 of the Communications Act (requiring multichannel video programming distributors to obtain retransmission consent prior to retransmitting the signal of a broadcast station) to open video system "operators," it warned that this should not be construed as a limitation on the class of entities encompassed by the term "multichannel video programming distributor." The House Commerce Committee stated, "Section 656 of [the 1996 Telecommunications] Act makes it clear which sections of current law will apply to the operation of the video programming affiliate or video platform. The fact that section 325 was included specifically in this Act should not be interpreted to suggest that the Committee in any way intends to limit the application of section 325 to any other multichannel video programming distributor. To the extent that third party package[r]s assemble multiple channels of programming for distribution on a common carrier's video platform, they also would fall clearly within the plain language of section 325." H.R. Rep. No. 104-204, 104th Cong., 1st Sess. at 104.

[10] See OVS Order at ¶ 195, 167.

The Commission did, however, consider the application of § 628 to OVS programming providers to determine what conduct by vertically integrated cable and OVS operators *vis a vis* OVS programming providers would be so clearly anti-competitive that regulations should be adopted making it a *per se* violation of § 628. Congress had already provided for certain *per se* violations of § 628(b) in §628(c)(2), including exclusive contracts between cable affiliated satellite programmers and cable operators as "minimum contents of regulations." Accordingly, § 628(c)(1) also requires the Commission to adopt any additional regulations that it finds necessary to carry out the purpose of § 628(b).[11] This broad mandate to adopt additional regulations clearly provides the authority for the Commission to adopt regulations requiring vertically integrated satellite programmers to provide non-discriminatory access to OVS programming providers.

In fact, before § 302 was even enacted, the Commission had already held that § 628(c) prohibits

> non-price discrimination by a programming vendor between competing distributors . . . one form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell', *including refusing to sell programming to a class of distributors*, or refusing to initiate discussions with a particular distributor.[12]

This Commission precedent prohibits discrimination against *any* class of programming distributors -- in this case unaffiliated OVS programming providers. The rules that the Commission adopted in its OVS order are well within its power under that provision.

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[11] 47 U.S.C. § 548(c)(1).

[12] Development of Competition and Diversity in Video Programming Distribution and Carriage (MM Docket No. 92-265), 8 FCC Rcd 3359, 3412 (1993).

B. Application of the Program Access Rules to OVS Programming Providers Will Enhance Competition

Rainbow also argues that the application of the program access rules to OVS systems will harm competition because satellite companies that are also OVS programming providers will have to provide their programming to competing OVS programming providers.[13] This claim ignores the realities of the marketplace and if the Commission were to adopt Rainbow's position, it would assure that cable companies could continue to stymie any competition whatsoever.

As a practical matter, if cable affiliated satellite programmers are allowed to deny their programming to competitive providers, the new competitors will have very little programming available to them. As the Commission noted in it order, cable operators control 51% of all national satellite delivered programming services.[14] Without the regulations adopted by the Commission, cable operators will undoubtedly try to protect their market power by causing their affiliated satellite programmers to refuse to sell these services to competing OVS programming providers. In fact, the record of cable affiliated programming providers -- and Rainbow in particular -- makes it clear that these entities will seek to withhold their programming as an anti-competitive effort, not from any altruistic purpose to increase competition.[15] In Boston, for

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[13] Rainbow Petition at 10-11.

[14] OVS Order at ¶ 189 (*citing* Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming), Second Annual Report, CS Docket No. 95-61, FCC-491, 11 FCC Rcd 2060, 2132 (1996)).

[15] *See Residential Communications Network of Massachusetts, Inc. v. Rainbow Programming Holdings, Inc.*, FCC File No. CSR 4721-P, *complaint filed* April 22, 1996. *Interface Communications Group, Inc. v. American Movie Classics Company and Rainbow Program Holdings, Inc.*, FCC Docket No. CSR448-P, *complaint filed* Jan. 16, 1996; *CAI*

example, Rainbow has denied RCN, a direct MVPD competitor to Rainbow's Cablevision-Boston affiliate, access to its SPORTSCHANNEL BOSTON, American Movie Classics and BRAVO programming.[16] To permit an affiliated programmer to withhold such important programming (particularly exclusive local sports programs) would assure that the competition envisioned by the Congress and the Commission cannot possibly occur.

Moreover, Rainbow's arguments are based on an OVS system model where various entities, all of whom are (or are affiliated with) satellite programmers, offer their services directly to subscribers and the subscriber is able to receive programming from a number of programmers, thereby allowing the subscriber access to all available programming over an entire OVS platform. However, there is no indication that all OVS systems could or should operate in this way. This model leaves no room for a programmer, such as RCN, that seeks to provide a carefully selected menu of available satellite programming. Under Rainbow's model, only OVS programming providers that are affiliated with satellite programmers (most of whom are also affiliated with cable operators) could survive. This would only increase the level of concentration within the video distribution market that has led to concern in Congress and at the Commission and is the basis of the OVS rules.[17] Furthermore, if an OVS system is developed in

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Wireless System, Inc. and Connecticut Choice Television, Inc. v. Cablevision System, Inc., Rainbow Holdings, Inc., et al., FCC Docket No. CSR-4479-P, *complaint filed* Feb. 28, 1995; *CellularVision of New York, L.P. v. SportsChannel Associates*, DA95-1835 (aug. 24, 1995), 8 FCC Rcd 9273.

[16] *Id.*

[17] See OVS Order at ¶¶ 189-190 (The Commission expressed concern that "[f]rom 1990 to 1995, . . . the percentage of subscribers nationwide served by the top ten multiple [cable] system operators increased from 61.6% to almost 80%" because the entities will be able to

the Rainbow model, wherein application of the program access rules would demonstrably *harm* competition, the programmer can petition the Commission for approval to deny competitive access.[18]

C. The Commission's Program Access Decision Promotes the Goals of OVS

Finally, Rainbow argues that the portion of the Commission's order related to program access is not "rationally related to promoting OVS goals." This argument is based solely upon restatements of the two arguments made above, and a claim that OVS programmers are somehow not MVPDs. As noted above, the plain language of the definitions of an MVPD includes any OVS programming provider offering more than one channel of programming. The statutory definition contained in § 602(13) defines an MVPD as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming"[19] Rainbow makes much of the fact that Congress did not specifically add "OVS Programming Providers" to this list. RCN notes that Congress also did not add "OVS Operators" to the list and even Rainbow does not contest that § 628 is made applicable to OVS Operators by the 1996 Act. More importantly, Congress included the language "*but not limited to*" in the definition so that it would not

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coordinate their conduct and use exclusive arrangements to "impede development of open video systems as a viable competitor.").

[18] OVS Order at ¶ 187 (exclusive contracts are prohibited "absent prior Commission approval").

[19] Communications Act § 602(13), 47 U.S.C. §522(13).

continuously have to update this list of possible MVPDs as technology develops. This list represents examples derived from technologies in place when the definition was drafted -- it should be afforded no greater significance.

Moreover, OVS programming providers clearly fit the definition in that they make "available for purchase, by subscribers or customers, multiple channels of video programming." They also fit the definition of MVPD contained in the Commission's regulations: "an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming."[20] It would be absurd for the Commission to ignore the clear meaning of these definitions merely because Congress did not add to a list that is expressly not intended to be exhaustive.

III. The Commission Should Uphold its Streamlined Regulation of OVS Systems to Encourage Competition

Several parties argue that the Commission should adopt additional requirements to be met by OVS operators before a certificate of compliance is approved.[21] Not only do such requirements run counter to the language of the statute, they violate the pro-competitive policy which underlies the 1996 Act. Congress provided for a 10-day period in which the Commission is charged only with reviewing the certification by the OVS operator that it will comply with all

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[20] 47 CFR 76.1000(e).

[21] *See Petition for Reconsideration and Clarification the Alliance for Community Media, the Alliance for Communications Democracy, the center for Media Education, People for the American Way, and the Media Access Project* ("Coalition Petition") at 15-18; *Petition for Reconsideration of the National Cable Television Association, Inc.*, ("NCTA Petition") at 2-6; *Petition for reconsideration of Metropolitan Dade County* ("Dade County Petition") at 4; *Petition for Reconsideration of the City of Indianapolis* ("Indianapolis Petition") at 2.

Commission regulations.[22] The Commission therefore properly resisted the urgings of various parties to adopt stringent pre-certification requirements, noting that, "[i]n addition to the potential for delay, some of the pre-certification requirements suggested by petitioners are beyond the scope of the certification process."[23] In recognizing the danger of delay, the Commission underscored the importance of avoiding the imposition of barriers to entry similar to those that have hindered the development of competition in the multichannel video distribution market thus far. As the Commission has long-recognized with respect to the non-dominant new entrants in the long distance and local telephone market, and in other telecommunications markets where competition exists, Title II-type rate and entry regulation is (1) not necessary to protect consumers or to assure just and reasonable rates and (2) likely to impair the ability of OVS operators to compete effectively in the market by "stifl[ing] price competition and service and marketing innovation."[24]

Some parties also argue that local franchising authorities should be able to require OVS operators to construct an institutional network in order to have their systems certified. This

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[22] 1996 Act § 653(a)(1); 47 U.S.C. § 573(a)(1).

[23] OVS Order at ¶ 30.

[24] Policy and Rules Concerning Rates of Competitive Common Carrier Services and Facilities Authorizations Therefore (CC Docket No. 79-252) ("Competitive Carrier Proceedings"), *Second Report and Order*, 91 FCC 2d 59 (1982) ("Second Report"), *recon.*, 93 F.C.C.2d 54 (1983) ("Recon Order"); *Third Report and Order,* 48 Fed. Reg. 46,791 (1983); *Fourth Report and Order*, 95 F.C.C.2d 554 (1983) ("Fourth Report"), *vacated, AT&T v. F.C.C.*, 978 F.2d 727 (D.C. Cir 1992), *rehearing en banc denied*, January 21, 1993; *Fifth Report and Order*, 98 F.C.C.2d 1191 (1984), *recon.*, 59 Rad. Reg. 2d (P&F)543 (1985); *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), rev'd, *MCI Telecommunications Corp. v. F.C.C.*, 765 F.2d 1186 (D.C. Cir. 1985).

would be a particularly onerous regulatory burden for these new entrants. The Commission's interpretation is supported by this plain language of § 611 as well as the policy underlying the 1996 Act. As the Commission notes in its order, the qualifying phrase "to the extent possible" contained in § 653(c)(2)(A) "provides the Commission with latitude to fashion a flexible regulatory approach that recognizes the differences between open video and cable systems."[25] As the Commission has recognized in the local telephone arena, requiring a new entrant to duplicate existing network facilities would not be economically justified and would instead serve as an absolute barrier to entry. Accordingly the Commission properly applied its discretion and expertise in adopting its PEG rules for OVS systems.

IV. Conclusion

The Commission's interpretation that program access rules must apply to OVS programming providers was well-reasoned and is essential to the initiation of meaningful

[25] OVS order at ¶ 146.

competition in the video distribution market. Petitions from reconsideration should therefore be denied.

Respectfully submitted,

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